FOR ARGUMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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ARGUMENT.

I.

RESPONDENTS HAVE FAILED TO ESTABLISH THAT LEGISLATIVE INTENT REQUIRES AN AWARD OF GENERAL COMPENSATORY DAMAGES WHEN INDIVIDUALIZED INJURY IS ABSENT.

In arguing that the legislators always intended that 42 U. S. C. § 1983 was to be a vehicle for the award of money to a wronged plaintiff, even absent individualized injury, respond-

ents employ the subtle rhetorical device of shift in meaning. Our language, and most assuredly our legal language, possesses words having more than one meaning or usage. Thus, *remedy* may be the right to seek redress, or it may also be actual relief of the redress, *i.e.*, an injunction or a monetary award. Courts and attorneys often use *injury* synonymously with *damage*. Most meanings are clear within the context of the writing but taken therefrom, may be used to import a different meaning. Finally, *damage* does not import the same meaning as *fact of damage;* the former being general and speculative; the latter being considered upon the evidentiary proofs.

The issue before this Court is the holding of the Seventh Circuit Court of Appeals that a plaintiff is entitled to receive at least a general compensatory award merely upon the showing of the violation of civil rights. In seeking to support this holding, the respondents quote the original bill's proponents: Representatives Sheldon, Frelinghuysen, Shellabarger, Hawley and Smith; and opponents Representatives McHenry, Kerry, Arthur and Thurman. To summarize, at pp. 9-14 of Respondent's Brief:

> The proponents:
>
> Sheldon: ". . . a permanent law affording to every citizen a remedy. . . "
>
> Frelinghuysen: ". . . the injured party should have an original cause of action. . ."
>
> Shellabarger: ". . . carefully confined to giving a civil action for such wrongs. . ."
>
> Smith: ". . . make the perpetrator liable to a civil action for damages . . ."
>
> Hawley: ". . . protect me. . . "
>
> The opponents:
>
> McHenry: " . . [the civil remedy is] a punishment or penalty. . ."
>
> Kerr: ". . . [gives] a civil action for damages. . ."
>
> Thurman: ". . . transferring all mere private suits . . . from the State into the Federal courts."

Respondents' quotes of Representatives Hawley and Arthur are simply the advocacy of, respectively, a proponent and an opponent.

It seems clear that all representatives agreed that the proposed enactment was to be no more than a remedy, a cause of action, not otherwise existing at common law. The salutory effects anticipated by the proponents, the disgraceful abuses expected by the opponents, neither added to nor detracted from the limited creation of a remedy alone. Certainly no congressman ever advocated that an individual be awarded money when he suffered no individualized injury or pecuniary loss.

The meaning which respondents' wish to give to "remedy" is actual monetary relief; injury has become "damages"; and further intended to mean an entitlement to an award, on the basis that "damage" satisfies the "fact of damage" requirement.

However, the congressional debaters discussed a cause of action only. This cause of action, whether intended to be remedial or deterent, can be no more than a right to seek redress for a wrong. Nothing in the congressional debates suggests that the courts of this land were directed to ignore that final and necessary element of a successful cause of action, the fact of damage.

Indeed, petitioners conclusion that 42 U. S. C. § 1983 was intended by its drafters to be a cause of action only, is the same conclusion reached by the Harvard Law Review, in *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. R. 1133, 1155 (Apr., 1977):

> Although the proposed Ku Klux Klan Act was the subject of a heated debate, section 1—which is today codified as 42 U. S. C. § 1983—was the least controversial portion of the bill. . . Section 1 caused the least concern, as it only added civil remedies to the criminal penalties established by the 1866 Civil Rights Act.

II.

THE NATURE AND NECESSITY OF THE FACT OF DAMAGE.

A. The Right to Receive an Award Requires the Proof of the Fact of Damage.

The entitlement to an award for the invasion of any right can only come after the plaintiff has met his burden of establishing his legal injury, the fact of damage, whereupon a jury could conscientiously speculate as to the amount. As this Court stated in *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 562 (1930), when defendant below asserted as error, that the damages awarded by the trier of fact was based upon pure speculation and conjecture:

> . . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor* v. *Bradley*, 4 Abb. App. Dec. 363, 366, 367, 100 Am Dec. 415:
>
> "It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.
>
> "The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not

> the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount."

Put another way, the plaintiff must clearly establish an evidentiary basis for the fact of his damage; then, and only then, may the trier of fact place a monetary value upon it. This is exactly the view which the Second Circuit applied in *Simon* v. *New Haven Board & Carton Co.*, 516 F. 2d 303, 306 (1975) when it held that uncertainty as to the amount of damages upon which the trier of fact may speculate, "does not extent to uncertainty as to the *fact* of damages" (Emphasis in original), which the plaintiff must prove.

Once evidence of fact of damage has been established, the trier may then seek to place a dollar value on the damages due. Petitioners accept, within this limitation, respondents' assertions, Respondents' Brief, p. 46, that deliberations may include such things as the defendant's conduct, the extent of plaintiff's proven indiginty[1], and other factors established by the evidence. The uncertainty of the value of these factors are thrust upon the erring defendant, but the risk of proving the legal injury, the fact of damage, never shifts from the plaintiff to the defendant. Whatever the plaintiff's difficulties may be in this respect, it is not the burden of the defendant, or the court or of the jury. As Justice Frankfurter explained in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267-268 (1945) (dissenting from the holding):

> The distinction is between proving that some damages were "the certain result of the wrong" and uncertainty as to the dollars and cents value of such injuring wrong. Such difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrong-doing defendant. But proof

1. Considering the illusiveness of the due process concept, petitioners suggest that these two school boys were hardly aware of a "due process evidentiary hearing" requirement. Query: If the boys were indignant at all, would they still be if Judge McLaren ruled that their hearings were adequate. Probably yes; but the indignity would be from having been caught and suspended for violating school regulations, as it always was—in the beginning, after the trial, perhaps even now.

> of the legal injury, which is the basis of his suit, is plaintiff's burden. He does not establish it merely by proving that there was a wrong to the public nor by showing that if he had been injured ascertainment of the exact amount of damages would have had an inevitable speculative element to be left for a jury's conscientious guess.
>
> * * * * *
>
> Where there is conceded legal injury, as for instance where one man's chattel is taken by another, as in the old case of *Armory* v. *Delamirie*, 1 Strange, 505, 93 Eng Reprint 664, we start with the legal injury and the problem is merely one of ascertaining damages "uncertain in respect to their amount." Such cases are not helpful where the crucial issue, as here, is whether there is solid proof of the existence of a legal injury.

The absence of this most important element of plaintiff's case is well demonstrated in *Hoefferle Truck Sales* v. *Divco-Wayne*, 523 F. 2d 543 (7th Cir., 1975). (This case was cited among Judge McLaren's authorities, but respondents ask this Court to disregard it, Respondents Brief, p. 50, because it was only a "normal rule for breach of contract cases.") Because of the multiplicity of parties, the trial in the district court was bifurcated. Defendants were found guilty in the liability trial. However, before the damage trial, both Clarence and Dolly Hoefferle died, thus precluding any testimony on the fact of Hoefferle Truck Sales damages. Not without sympathy for this plaintiff, Judge Bauer affirmed the trial court's denial of damages because of the "speculative inference" of the extent of the Hoefferle injury.

This sound rule of law had been followed in the Seventh Circuit until *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975). In a case which had been brought to this Court, on other grounds, the trial judge, Chief Judge Steckler denied damages in *Jacobs* v. *Board of School Commrs. of City of Indianapolis*, 349 F. Supp. 605, 612 (Ind., 1972) *aff'd* on other grounds, 490 F. 2d 601 (1973), *rev'd* on other grounds, 420 U. S. 128 (1975):

> In addition, with respect to plaintiffs' request for compensatory damages, the court finds that plaintiffs have not established sufficient data from which the court can properly estimate the extent of damages, if any. Such damages sought to be received must be shown with reasonable certainty as to their nature and extent, and may not be based upon mere speculation or conjecture. (Citations omitted.)

Plaintiffs Jacobs, *et al.*, just did not have any damages, and never raised the issue in either the Circuit Court of Appeals or in this Court.

B. The Fact of Damage Is Not Inherent in Respondents' Deprivation of an Adequate Due Process Hearing.

Respondents assert that harm is inherent in the deprivation of a due process right. The difficulty with their claim is that (a) harm is generalized injury, not fact of damage; and (b) it acknowledges that the plaintiffs below had suffered neither tangible nor intangible damage which would entitle them to an award had they met their burden of proof.

Inherent harm, the respondents claim, is four-fold (p. 27, Respondents' Brief). Petitioners believe that in Respondents' discussion, Respondents' Brief, pp. 27-31, of the nature and extent of the inherent harm which they find in the failure to provide an adequate due process hearing, is reasoned to be, ultimately, the failure to provide an adequate due process hearing.

None of the numerous examples given by respondents support the inherent damage theory of the Seventh Circuit. Humiliation, distress and outrage (Respondent's Brief, p. 29) stigma and indignity suffered (Respondent's Brief, p. 31) are actual and subjective injuries considered under general compensatory damages. A value may be placed on personal property taken or time lost because of a revocation of probation (Respondents' Brief, p. 30), which the trier of fact may weigh. The loss of

educational opportunities (Respondents' Brief, p. 30) is surely not inherent—to some children, this might be of great importance, to others, none: what is the inherent harm to a boy who is otherwise a chronic truant; what is the value to the bright student who suffered no diminishment in grades or learning? Respondents are asserting these examples of pecuniary loss or individualized injury, none of which were suffered by the plaintiffs below.

Counsel for respondents now challenge for the first time in this case, certain elements of the Statement of Facts. Because of the prejudicial atmosphere which is sought to be created by this unsupported challenge, petitioners feel obliged to respond to these statements.

Petitioners submit that the Statement of Facts is identical in substance to that submitted by them to the Seventh Circuit Court of Appeals, and to which plaintiffs below offered no objection. The only changes are slight condensing and eliminating of references to the record, all upon the reasonable assumption that the original accurate record, never challenged, would not be attacked at the eleventh hour.

Respondent Brisco now attempts to dispute petitioners' Statement of Facts, never previously disputed by him, by introducing a "distractor" of First Amendment rights of free expression. This issue was never reached by the trial court, and the only support for the claim was Brisco's answer, in his deposition, that his reason for wearing the gang earring was "blackness."[2] Regardless

2. At pp. 11-12, Silas Brisco testified:

Q. Mr. Jezik told you to remove the earring, did he not?
A. (By Mr. Brisco) Yes.
Q. Mr. Jezik also stated to you that he believed it was a symbol of gang membership, did he not?
A. Yes.
Q. What, if anything, did you say to him when he said that?
A. Well, I didn't say nothing.
Q. Did he ask you to remove the earring?
A. Not at that time.
Q. What, if anything else, did he say?

(Footnote continued on next page.)

of Mr. Brisco's subjective reason, the earring was known to be a gang symbol, gangs were actively recruiting members at Brisco's school, and the violence associated with this recruitmen constituted a threat to the safety and well-being of the children. School authorities would have been open to the charge of being remiss in their duties had they not banned these gang symbols. This ban, and the reason for it, was always known to Mr. Brisco.

Likewise, the emphasis upon the use of marijuana by Mr. Piphus works as a distractor because it ignores the fact that merely by smoking any substance, tobacco or marijuana, Mr. Piphus was in violation of the school rules.[3] It is undisputed that the school principal personally believed the substance to be

(Footnote continued from preceding page.)

A. He just started explaining that he, that there would be trouble if I wear the earring in school, and stuff, and people might come up after me and stuff.
Q. What, if anything, did you say at that time?
A. I say, "The earring dont' mean nothing."
Q. It really doesn't mean nothing?
A. Nothing but blackness.

3. Deposition of Reginald Brown, Principal of Chicago Vocational High School, p. 10.

Q. What is prohibited?
A. (By Mr. Brown). Smoking of cigarettes or marijuana. There is no smoking period, of anything.
Q. So that there is a rule against smoking?
A. Yes, yes, plus there's a city ordinance against smoking in public buildings.
Q. Are there any written—
A. Yes.
Q. —smoking rules?
A. There's—there's a rule that prohibits it.
Q. Is it a written rule of the schoool?
A. Yes.
Q. What exactly is the content of the rule?
A. That it is prohibited.
Q. All types of smoking?
A. Yes.
Q. Both tobacco—
A. Smoking period.
Q. —and marijuana?
A. Smoking period.

marijuana, and Mr. Piphus denied only that the substance was marijuana, and he has even from the filing of his complaint, always admitted his culpability.

Respondents also attempt to make an issue of the fact that no appeal had been taken by the petitioners. Inasmuch as the major thrust of the lawsuits below was the claim of unconstitutionality of certain Board of Education Rules involving suspensions, and those Rules had been changed to conform to this Court's holding in *Goss* v. *Lopez*, 419 U. S. 565 (1974), the issue was moot. (See the opinion of Judge McLaren, and footnotes thereto, at pp. A10-A11 of Pet. for Writ.)

The fact of damage cannot be said to evolve inevitably in the areas claimed by respondents. Upon proof of tangible physical injury, the trier of fact may infer pain and suffering, for common experience has shown that one inevitably follows the other. Indignity, humiliation, stigma, all also require an evidentiary basis. If the evidentiary basis is present, a trier of the fact may weigh the amount of damages; absent that basis, the trier of the fact cannot even consider an award.

Furthermore, the concept of "inherent damages" deprives the defense counsel of the truth seeking process of cross-examination. In private injury litigation, liability may be obvious, but the claim of injury a sham. If the defense counsel believes this, he has his opportunity to cross-examine the plaintiff to establish the theory, or even clarify the limits of any intangible injury claimed. In the same cases, the defense might also rebute with expert witnesses. None of this is possible if a trier of the fact *must* award damages solely because liability has been established.

The fundamental fallacy of the theory that damages are inherent in the nature of the violation can be readily noted from a portion of Mr. Justice Frankfurter's dissenting opinion in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267 (1945):

> . . . [A]ction by the government to enforce anti-trust acts merely requires proof of illegality, [and] an individual's right of recovery is dependent on proof of legal injury to him, . . .

It is the state, and only the state which has a right to have redress for that wrong. When the law is broken, the state need not prove any individualized injury. Such form of wrong is to the state as the representative of the people, and it is committed by the mere breach. The private citizen, upon his own cause of action, does not stand in the shoes of the state. His remedy is to redress the special injury to him. And, he cannot prevail in civil litigation upon merely the claim of inherent wrong.

Inescapably, one reaches the conclusion that only the fact of damage entitles a prevailing plaintiff to some compensatory monetary award. "Inherent damages", not only falls short of establishing that fact, but also exists only in the abstract, a concept upon which a trier of fact could not even speculate. As Circuit Judge Wright observed in *Dellums* v. *Powell* (D. C. Cir., Case No. 75-1974, August 4, 1977.), "The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights".

III.

COMMON LAW TRADITION FAILS TO SUPPORT AN AWARD OF GENERAL COMPENSATORY DAMAGES TO A PLAINTIFF WHO HAS ONLY ESTABLISHED A BREACH OF A RIGHT.

A. Respondents' "Voting Rights Cases" Do Not Support a Presumption of Damages Inherent in the Nature of the Violation of the Right.

Neither English nor American precedent can support the respondents' unequivocable conclusion that certain voting rights cases require an award of damages solely for the invasion of the civil right. The major cases of respondents' brief (Respondents' Brief, pp. 18-24), are best considered in historical sequence.

Ashby v. *White*, 2 Ld. Raym. 938 (1703) is most complex. As a "voting rights" case, it appears to be the first of its genre.

The House of Lords reinstated a trial verdict for the plaintiff, upon the reasoned dissent of Lord Chief Justice Holt (2 Ld. Raym., pp. 950-958) from the reversal of the trial judgment by his brothers. The plaintiff had brought his action for the denial by the registrar of the right to cast a vote for a parliamentary representative. There was serious doubt as to whether or not the claim was actionable, and the court held that it was not. Lord Holt dissented and stated, at 950:

> *The single question in this case is,* whether, if a free burgess of a corporation, who had an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, *if an action on the case will lie against such officer.* (Emphasis added.)

Lord Holt conducted a two-fold inquiry: first did the right exist; second, was its denial actionable at law. He found in the affirmative on both issues. However, at no time did he ever consider the measure of damages. The usual remedy of the common law being that of damages, the Chief Justice addressed that point only on the right, on the grounds therein, to seek that remedy. In fact, it is probable that, judging by his comparison to other common law trespasses, and the nature of the defendants' wrong, he intended either nominal or punitive damages (2 Ld. Raym., at p. 955): "[B]ut surely every injury imports a damage, though it does not cost the party one farthing and it is impossible to prove to the contrary"; and, "If publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences (sic)." In *Drewe* v. *Coulton* (1787) (cited in full in *Harman* v. *Tappenden,* 1 East 560, 563 [1801]), *Ashby* v. *White* was reversed: the negligent denial of voting rights would not give rise to an action at law, although an action might still lie if actual malice were to be proved. This reversal was noted in *Lincoln* v. *Hapgood* also cited by respondents as authority, and discussed next, below.

Lincoln v. *Hapgood,* 11 Mass. 350 (1814), is a strange case, for it seems to be an action brought upon the claim of a

right of a freeman to vote in as many jurisdictions as he desires, without regard to residency requirements. A jury had awarded some unspecified damages. On appeal, the court affirmed. Plaintiff's injury was compared to harm his reputation, and the denial of his vote was tantamount to his exclusion from the ranks of the citizenry. Defendants, on the other hand, followed the law and neither negligently, wilfully nor maliciously deprived the plaintiff of his vote. Upon the whole, "leave cases of this kind to the jury."[4]

The 1919 voting case of *Wayne* v. *Venable,* 260 F. 64 (8th Cir., 1919), cited by Respondents Brief, p. 24, and by *Amicus* Brief, pp. 31-32, finds its support in *Scott* v. *Donald,* 165 U. S. 58 (1897) and *Wiley* v. *Sinkler,* 179 U. S. 58 (1900). No such reliance supports the respondents' "inherent damages" theory, as will be noted in the foregoing discussion of those cases. However, to the extent that the *Wayne* court did discuss damages, it is apparent that it directed the reference to intangible, general damages, rather than some form of "inherent damages". For, as the court states, at p. 66, such damages would be awardable "[W]ithout evidence of actual loss of money, property, or any other valuable thing, . . ." At best, the court alludes only to the possibility of some intangible yet real injury arising from the breach of a duty owed to the plaintiff by the defendant.

In *Scott* v. *Donald,* 165 U. S. 58 (1897), plaintiffs sought to recover special compensatory and punitive damages for the unlawful taking of chattels (wine and liquor) by local constables. Although the plaintiffs and the defendants alluded to the constitution for protection of their respective rights, the action was clearly pleaded as one of trespass. The lower court award —$300, the small value of the chattels, plus punitive damages, was affirmed.

Respondents' reliance on *Wiley* v. *Sinkler,* 179 U. S. 58 (1900) surely must be misplaced. The quote, from which re-

4. Today even under this Court's rigid good faith standard of *Wood* v. *Strickland,* 403 U. S. 308 (1975), defendants Hapgood and others probably would have not been held to damages.

spondents' draw only a portion of a sentence, p. 24, footnote 5 misinterprets the opinion. The court's entire point was a jurisdictional issue, and the full quote, 179 U. S. at 65:

> The damages are laid at the sum of $2,500. What amount of damages the plaintiff may recover in such an action is peculiarly appropriate for the determination of the jury, and no opinion of this court upon that subject can justify it in holding that the *amount in controversy was insufficient to support the jurisdiction of the circuit court.* (Emphasis added.)

The court conducted no inquiry into the nature or type or amount of damages to which a successful litigant might be entitled following a trial on the merits.

That "Mr. Justice Holmes recognized in *Giles* v. *Harris*, 189 U. S. 475 (1903), that damages are a uniquely appropriate remedy for the violation of certain political rights, such as the right to vote" (Respondents' Brief, p. 19), not only represents a misinterpretation of this Court's opinion but also distorts the entire direction and basis of the case. The plaintiff below had brought a bill in equity, complainting that he and his class had been refused registration to vote, and praying that the Court direct them to be placed upon the rolls. The case was not a private cause of action seeking damages. Mr. Justice Holmes addressed this issue only in two senses. In the first instance, he was satisfied that the jurisdictional amount, as required by statute, could be met by the mere assertion of the claim (but held that the issue had not been preserved for review) in the second sense, he distinguished between an actionable private cause of action and a non-actionable political question. He affirmed the lower court's dismissal based upon lack of jurisdiction.

In *Nixon* v. *Herndon*, 273 U. S. 536 (1927), this Court refused to recognize the defense of "political question" and affirmed the right of a citizen to bring a private cause of action upon a claim of denal of voting rights. At no time did this court consider either the nature or the measure of damages to which a prevailing plaintiff might be entitled.

Through the medium of the opinions of Mr. Justice Frankfurter, respondents unite the holdings of this Court in *Coleman* v. *Miller*, 307 U. S. 433 (1938), and *Colgrove* v. *Green*, 328 U. S. 549 (1946). In each instance, the comparison to a private cause of action was raised only to demonstrate that the cause of action brought below was both political and non-justiciable. Whether actionable or not, neither Mr. Justice Frankfurter nor any other member of this Court deciding these cases ever held that plaintiffs were entitled to receive damages inherent in the nature of the wrong.

Generally speaking, most American courts which have considered damage claims for deprivation of voting rights seem to follow the later English case of *Drewe* v. *Coulton, supra.* rather than the earlier *Ashby* v. *White, supra. Ashby* seems to be cited for the proposition that a cause of action exists at common law for the deprivation of voting rights, but otherwise the basis of liability and the measure of damages, will be governed by the malice standard of *Drewe*.

Lincoln v. *Hapgood, supra,* deferred to the jury for liability, but the majority rule among those states which have considered the claim is that a plaintiff may recover no more than nominal damages unless he demonstrates malice or wilful misconduct, thereby justifying a punitive award. These cases support that majority:

> In *Long* v. *Long*, 57 Iowa 497, 10 N.W. 875, 876 (1881), the court affirmed the validity of a jury instruction, as to the measure of damages, in that "if the defendant acted without malice the plaintiff was only entitled to nominal damages."
>
> *Lane* v. *Mitchell*, 153 Iowa 139, 133 N.W. 381 (1911): more than nominal, *i.e.*, punitive, awardable if wilful and malicious wrong was done.
>
> *Larson* v. *Marsh*, 144 Nebr. 644, 14 N.W. 2d 189, 193 (1944), held that nominal damages are the measure of recovery where the legal wrong has been established but there is no proof of actual damages.

The direction which these early cases sought to give was that a private remedy existed for the deprivation of voting rights. In no sense did the courts propose some form of strict liability of damages, which "inherent damages" indeed is. Finally there is no sign that these judges, trained in the solid tradition of the common law, ever intend that some new and special rule be created to award money, absent the fact of damage.

B. Statutory Violations Do Not Imply Inherent Damages, But Continue to Require Fact of Damage.

Respondents presume that the violation of the statute, the invasion of the right, establishes some strict liability of damages. However, the violation of a statute creates only a remedy—a cause of action, a right to recover. The violation alone is not the equivalent of the fact of damages, the amount of which a trier of the fact may guess. In an early case before this Court, an employee was physically injured, allegedly through his employer's violation of certain federal safety acts. The Court, in affirming for the plaintiff below, held in *Texas & P. R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1915):

> A disregard of the command of statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in Comy's Dig., titled, "Action upon Statute" (f), in these words. "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law."

The remedy provided by statute is the right to seek redress for the wrong. The remedy most assuredly is not automatic relief when a violation of a right has been shown. As this Court held in *Rondeau* v. *Masinee Paper Corp.*, 422 U. S. 49, 64-65 (1975), in rejecting respondent's contention that a violation of

the Williams Act[5] by the petitioner was sufficient to entitle the respondent to relief (here, an injunction):

> The fact that the respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief.

In *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267-268 (1945), an anti-trust action, Mr. Justice Frankfurter's dissenting opinion demonstrates that clear distinction between the violation of the law and the necessity of proving individualized injury or pecuniary loss.

> A right of action is also given to any individual who has been "injured in his business" by such illegality. But while action by the Government to enforce the Anti-trust Acts merely requires proof of illegality, an individual's right of recovery is dependent on proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman Law.

Several of these cases emanate from securities and anti-trust laws, and the frequency of which violations thereof have been presented to this Court need not be further recited. Yet, one must observe that the same public cry of outrage, the same congressional concern which accompanied the enactment of the Ku Klue Klan Act also accompanied the enactments of the anti-trust and securities acts.

C. General Compensatory Damage Award in the Absence of Individualized Injury Is Without Foundation in the Common Law.

Petitioners accept Respondents' concession, (p. 15, Respondents' Brief) that the common law limits compensatory damages to the measure of damages for the actual injury suffered. Actual

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5. Amendment of Securities Exchange Act of 1934, 15 U. S. C. § 78m(d).

and legal injury is the coincident of the fact of damage, which has always been a necessary element to successful recovery for a wrong. Petitioners' Brief accurately and correctly set forth the common law of damages, and no exception which respondents now argue can dispute that traditional law.

Respondents justify much of their argument in support of their conclusion that damages must be awarded, absent individualized injury, by analogy to cases allowing awards for intangible injuries. This begs the question. The Seventh Circuit's holding did not deal with intangible injury but rather "inherent damages". Whatever the respondents may wish this to be, "inherent damages" is not the intangible injury which supports awards of general compensatory damages. (See, *e.g.*, *Seaton* v. *Sky Realty*, 491 F. 2d 634 [7th Cir., 1974] which discusses at length those types of intangible injuries, the fact of damage, which justify an award of general compensatory damages: subjective pain and suffering, humiliation, embarrassment, discomfort, mental anguish, emotional and mental distress.)

While some courts seem obliged to pronounce that there is damage in the violation of priceless rights, even then awards are nonetheless based upon the individualized injury which the plaintiff may have suffered. This may be readily seen in a case cited by respondents (Respondents' Brief, p. 21), *Manfredonia* v. *Barry*, 401 F. Supp. 762 (E. D. N. Y., 1975). Plaintiffs brought a § 1983 action based upon false arrest affected by certain police officers. The court found the defendants liable, and then proceeded to discuss the issue of damages. At the outset the court observed, at p. 771:

> To assign an appropriate monetary value to the denial of rights so highly prized, however, is not a simple task, if it is not to be purely arbitrary.

Thereafter, the court discussed the effects upon the plaintiffs, as had been adduced from the evidence. They suffered mental and emotional distress. The plaintiffs had been unlawfully fingerprinted, photographed and jailed overnight. They received

undesirable public notoriety and harassment from neighbors, even relatives. Furthermore, they received numerous anonymous letters and telephone calls, conveying threats of harm or insulting and scurrilous remarks. Thereupon, the court held, at p. 772:

> [The defendant police officers] are responsible for the natural and normal consequences of their acts when they failed to act as reasonably prudent men by making these unlawful arrests. Having recklessly deprived these plaintiffs of important constitutional rights—which the defendants should clearly have recognized and protected—and wrongfully subjected them to mental and emotional distress of being charged as criminal offenders and the public humiliation which followed, the defendants must make compensation.

The award of general compensation could only have been made upon the individualized injuries suffered by each plaintiff. To assume otherwise would be to give no meaning to the court's considered discussion of what actually did happen to the plaintiffs as a result of the defendants' unlawful acts, and would render an award "purely arbitrary".

Numerous other cases cited by respondents (Respondents' Brief pp. 20-24) conform to the traditional rules of damage. Plaintiffs received special compensatory damage awards upon proof thereof; if intangible but nonetheless real injury were to be present—humiliation, distress, pain and suffering, or the like—the plaintiff received general compensatory damages. None of these cases dispensed with the requirement of proof of pecuniary loss or individualized injury.

As Mr. Justice Powell observed in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974): "[A]ll awards must be supported by competent evidence concerning the injury although there need be no evidence which assigns an actual dollar value to the injury." This is the rule which must be applied when the parties reach the damage issue of a lawsuit. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, ... U. S. ....., 97 S. Ct. 690 (1977),

this Court unanimously refused to allow the respondents a new trial, upon the reversal of the district court's award of approximately 7 million dollars in treble damages in an anti-trust case:

> . . . Since respondents did not prove any cognizable damages and have not offered any justification for allowing them, . . . [petitioner is] entitled to judgment on the damage claim. . . .

Respondents rely on the Seventh Circuit's holding, principally buffered by the earlier case in the same circuit, *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975). Both the present case and *Hostrop* found neither tangible nor intangible injury, but held that the fact of an injury was established by the mere violation of the statutory protection of 42 U. S. C. § 1983, and this, by itself established the fact of damage.

Some Courts since *Hostrop* seem to ascribe to the principle of damages inherent in the violation of priceless constitutional rights. But, as before, it is clear that awards are sustained only upon proof of the fact of damage, an individualized injury or a pecuniary loss. In the case cited by Respondents' Brief, pp. 20-21, *Tatum* v. *Morton* (D. C. Cir., Case No. 76-1187, Aug. 10, 1977), (as yet unreported during the preparation of this Brief), the court definitely focused upon the special and general loss of plaintiffs whose authorized public demonstration was prematurely ended, the demonstrators taken into police custody, booked, required to post a $10 collateral each, and otherwise subjected to indignities (including an obnoxious strip search), the court affirmed an award solely because of the plaintiffs' pecuniary losses and individualized injuries. At p. 6 of the courts' slip opinion, it considered first the special compensatory damages:

> At a minimum the monetary importance of this right is indicated by the expenditures they devote to their trip, and the willingness to forego a day of their own time, whether at work or in recreation.

And, next, the general compensatory damages, upon the intangible injuries, at p. 6 of the slip opinion:

> Compensatory damages embrace more than recompense for monetary injury, however as is evident from amounts for pain, suffering and humiliation.

Judge Wilkey's concurring opinion advocated some moderate collective award, lest public reaction to the payment of substantial amounts from public funds cause Congress to ban demonstrations in various areas of the capital.

A week earlier, Judge Wright (who participated in the *Tatum* decision) wrote the majority opinion in *Dellums* v. *Powell* (D. C. Cir., Case No 75-1974,[6] August 4, 1977) (unreported during the preparation of this brief), addressed the issue of "inherent damages." With great succinctness, he cut to the heart of the problem, at pp. 52-54 of the slip opinion:

> That loss of opportunity to demonstrate constitutes loss of First Amendment rights "in their most pristine and classic form" does not mean, however, that monetary recompense should be extravagant. The award should be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights. Comparing these principles with the instructions actually given the jury, we find error because *these instructions did not require the jury to focus on the loss actually sustained by the plaintiffs.* (Emphasis added.)

Judge Tamm, dissenting, would have reversed on liability, and therefore did not reach the issue of damage.

A plaintiff who cannot meet his burden of proof as to his legal injury, his fact of damage, can find no solace in the common law. The plaintiff has no right to go to the trier of fact when he has failed in his evidentiary burden of pecuniary loss or individualized injury, and most assuredly he cannot do so upon the theory of "I can't-prove-it-so-please-presume-it."

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6. Note that there are four *Dellums* opinions, not necessarily involving the same parties or the same issues.

D. The Common Law Also Recognizes an Award of Nominal Damages for Civil Rights Violations.

Under the common law, the trier of fact also has available the remedy of nominal damages even in civil rights cases. In *Magnett* v. *Pelletier*, 360 F. Supp. 902 (D. C., Mass., 1973) *rev'd.* in part, 488 F. 2d 33 (1st Cir., 1973) the district court awarded $500 nominal damages for a civil rights violation, which was affirmed by the Circuit Court as to the category of the award, but it then directed that the amount be reduced to $1.[7] In *Cordova* v. *Chonko*, 315 F. Supp. 953 (N. D., Ohio, 1970), the district court refused to enter a compensatory award and instead allowed $0.01 in nominal damages for violation of a student's civil rights. Some members of this Court have also approved the concept of awarding nominal damages for the violation of civil rights, *Codd* v. *Velger*, 429 U. S. 625 (1976), Mr. Justice Brennan, dissenting, at footnote 3, indicating that the trier of fact may consider an award of nominal damages for the denial of a timely due process hearing.

Respondents' argument that an award of a trivial sum (nominal damages), at p. 45, Respondents' Brief, is to trivialize the violation of a constitutional right. This cannot be so. Money is the measure of damage, and as petitioners pointed out, at pp. 14-15, Petitioners' Brief, nominal damages *may* be awarded when a paramount right has been invaded, even though the plaintiff suffered no actual injury. Numerous civil rights cases support this tenet of the common law of damages; and, to consider several:

> *Hammond* v. *Housing Authority*, 328 F. Supp. 586 (Ore., 1971). Plaintiffs proved a violation of their civil rights, but no actual damages. Compensatory damages were denied,

7. The Circuit Court's holding is correctly cited above. Respondents' quotation from this case, at p. 21 of their Brief, is accurate but it is *dicta* by the court. Therefore, respondents' conclusion as to the holding—a remand to consider general compensatory damages —is erroneous since their conclusion relies on that *dicta*.

> and the court allowed $1,000 in attorneys' fees for vindication of the rights.
>
> *Mayberry* v. *Robinson*, 427 F. Supp. 927 (M. D Pa., 1977). The right of the jury to award nominal damages for violation of civil rights was affirmed, but the amount of $100 was reduced to $1, in accordance with the rules of the circuit.
>
> *Hodge* v. *Seiler*, 558 F. 2d 284 (5th Cir., 1977). Relying upon *Wayne* v. *Venable*, 250 F. 64 (8th Cir., 1919) and *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (7th Cir. 1975), the court held, at p. 288. "[I]t was error for the district court to decline to award Mrs. Hodge *at least nominal damages*." (Emphasis added.)[8]

Perhaps respondents are only concerned with the categorization, for they see no fault in awarding "damages, which may not be much larger than nominal, but are still compensatory in nature." (Respondents' Brief, p. 49.)

IV.

COMPELLING PUBLIC POLICY CONSIDERATIONS REQUIRE A DENIAL OF "INHERENT DAMAGE" WHEN THE CIVIL RIGHTS VIOLATION IS MERELY CONSTRUCTIVE RATHER THAN INTENTIONAL.

It is perhaps best to first reexamine the factual envelope surrounding the respective suspensions of Messrs. Piphus and Brisco, especially in light of the respondents' frequent referral to the defendants "bad faith constitutional violations"[9] which

8. There is precedent for holding that while a trial court's failure to award nominal damages can be error, it is "de minimus" and will not be reversed on appeal, *Schaeper* v. *Edwards*, 360 F. 2d 175 (6th Cir., 1962). However, petitioners take no position on a remand solely for that reason.

9. This phrase is, at best, of the "mixed metaphor" category—producing an incongruous assembly of ideas. A plaintiff's claim that his civil rights had been violated may be one matter, quite apart from a defendant who may assert certain affirmative defenses, such as

(Footnote continued on next page.)

first appears at page one of their Brief and continues throughout.

As to Mr. Piphus, he was observed smoking on school premises by his principal, who recognized the substance as marijuana. Piphus denied the substance, but admitted the smoking.[10] The trial court held that Mr. Piphus had actual notice of narrow rules prohibiting his misconduct. Mr. Brisco also violated school rules of which he had prior actual notice. He particularly knew that his school educators, concerned with violence connected with gang recruitment at the school, had banned all gang symbols, which included male earrings. When given the opportunity to remove his gang earring or face suspension, Brisco chose to keep his earring. Upon his own explanation of the events at that time, he merely asserted that the earring symbolized nothing. Upon these flagrant violations of school rules each plaintiff elected to sue all members of the Board of Education; the acting general superintendent of schools, since retired (Mr. Redmond), and various other educators who were involved to a greater or lesser degree in the plaintiffs' suspensions.

Against this background, the trial court found (Opinion, Pet. for Writ, p. A13):

(Footnote continued from preceding page.)
good faith. "Bad faith", therefore, is not an element of the tort —and, it is not even the opposite of a "good faith immunity". The former imports evil or wilful misconduct; whereas, the defendant looses his good faith immunity merely by having failed to have foreseen, under the reasonable man standard of *Wood* v. *Strickland*, 420 U. S. 308 (1975).

10. Deposition of Jarius Piphus, p. 19, August 23, 1974.

Q. Were you smoking that day?
A. (By Mr. Piphus) yes.
Q. Did you have a cigarette in your hand at the time you saw Mr. Brown?
A. No, I didn't.
Q. Had you had a cigarette in your hand just prior to the time you saw Mr. Brown?
A. Yes, I did.
Q. Where did you light that cigarette?
A. When I first came out the door.

> Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly the defendants believed that they were protecting the integrity of the educational process.

However, Judge McLaren felt that this was not enough to pass the second part of the "good faith immunity" test required by *Wood* v. *Strickland*, 420 U. S. 308 1975), since the defendants should have foreseen that the "*Linwood* Rationale"[11] required that the defendants provide more than the informal hearings which were given the boys.

With full knowledge of the foregoing, it is incomprehensible that the respondents would label defendants' conduct as being the equivalent of evil and wilful intent. Where, one may ask, is either the actuality, even a parallel, to the petitioners' act as are compared to the respondents' various hypothetical examples:

> Brisco's earring was intentionally seized and destroyed. (Respondents' Brief, p. 32.)
>
> An Orthodox Jew's religious symbols were maliciously destroyed by prison officials. (Respondents' Brief, p. 32.)

11. In *Linwood* v. *Board of Ed. of City of Peoria*, 463 F. 2d 763 (7th Cir., 1972), the court had occasion to review certain school board rules related to evidentiary hearing for students facing expulsion. The rules were found to satisfy constitutional due process requirements. The court also observed, in *dicta*, that those same hearing factors would be required for suspensions in excess of seven days.

Defendants/petitioners had suggested to the trial court, in legal memoranda, that *Betts* v. *Board of Ed. of Chicago of Chicago*, 466 F. 2d 629 (7th Cir., 1972) would be the appropriate guide, in view of the admitted culpability of Messrs. Piphus and Brisco. At 633, the court held:

> As to what process is due, it is important that the plaintiff unequivocally admitted the misconduct with which she was charged. In such a circumstance, the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question whether [the plaintiff clearly violated a school rule] is not essential.

In adopting the *"Linwood Rationale"*, Judge McLaren remained silent on any possible application of *Betts*.

> Police break into a citizen's home, absent cause or reason. (Respondents' Brief, p. 32.)
>
> A sheriff knowingly abuses his authority and imprisons a murder suspect for five years. (Respondents' Brief, pp. 33, 37, 46.)

Unlike respondents' examples, petitioners herein were found guilty only upon the legal construction that they should have known, the typical assignment of constructive knowledge which appears in negligence torts. Constructive breaches in constitutional torts can be no different from constructive breaches in any other tort. Nowhere in tort law is a defendant "punished" by being required to pay money when the plaintiff has failed to show his legal injury, his fact of damage.

Must the schools now become part of a *Through the Looking Glass*[12] syndrome. If so, disobedient children shall now reap monetary awards when they had suffered no legal injury. At the same time, dedicated educators shall be called upon to pay them for judgmental errors, made in exercise of the supervisory discretion which our courts regularly claim belongs in the province of the educators.[13] Is it wise, for example, to allow a child to recover "inherent damages," if he can find the grounds to support his claim that his civil rights were violated when he was directed by his teacher to write fifty times, "I will come to school prepared".[14]

12. Lewis Carroll's 1872 sequel to *Alice in Wonderland*. Alice, in her new adventures, wondered what life was like beyond her mirror. She discovered that everything was backwards.

13. To be sure, upon recitation that public school education is best left to those charged with the duties, the courts regularly substitute its judgment for that of the school. See, *e.g.*, *Goss* v. *Lopez*, 419 U. S. 565, where both the majority and the dissent reach different conclusions upon the same observation.

14. This is not a hypothetical, but is actually a portion of a claim brought against school personnel in *Woods* v. *Hannon*, 77 C 289 (N. D., Ill.), a recently filed lawsuit against Board of Education personnel based upon 14th Amendment due process and equal protection claims, in failing to waive various school incidental fees.

(Footnote continued on next page.)

Presumably, respondents attempt to justify the imposition of damages absent legal injury by asserting that the defendants can afford to pay. After all, they say, principals earn over $30,000 annually, and besides, there is a statutory promise of indemnification (Respondents' Brief, p. 47). And, of course, "the amount of litigation spawned by public school educators . . . when their own jobs are at stake. . ." (Respondents' Brief, p. 26, Fn. 6) somehow estops the petitioners from contesting the issues herein. Each argument addresses no issue before this Court. Almost all of the defendants, in each suit, serve without pay; and what is a $30,000 salary to Rudolph Jezik, Jr., principal of the Barton School (Brisco), whose death was spread of record on February 4, 1974, after he was shot at the school.

What is important in these constructive violations is the effects of these awards upon defendants who act under the sincere belief that they are protecting the educational process. As observed by the Harvard Law Review article on § 1983 law:[15]

> Certainly, there can be little doubt that as a general matter, government officials must inevitably make numerous discretionary decisions, and that the process of doing so may well *not* be enhanced by the frequent presence of the decisionmakers as defendants to 1983 actions. (Emphasis in original.)

Thus, in addition to problems of obtaining qualified public servants in the face of this threat, the danger also exists that those public educators may refrain from necessary discretionary decisions, when faced with the potential of paying damage to someone who suffered no real injury but merely claimed an entitlement to "inherent damages". As Judge Hand observed, in

(Footnote continued from preceding page.)

The specific reference is to plaintiff Marcus Woods' claim that the school required him to wear gym shoes in physical education class, even though he could not afford them and had to write the sentences, above, when he came unprepared for class.

15. *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. R. 1133, 1222 (April, 1977).

an action for false imprisonment, in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2nd Cir., 1949):

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from those errors.

In *Barr* v. *Matteo*, 360 U. S. 564, 571-572 (1959), an action for defamation, this Court considered Judge Hand's earlier opinion, and explained the rationale:

> It has been thought important that officials of government should be free to exercise their duties unencumbered by the fear of damage suits in respect of acts done in the course of those duties—*suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might inhibit the fearless, vigorous, and effective administration of policies of government.* (Emphasis added.)

While both of the above cited cases dealt primarily with the issue of immunities from suit—which this Court still recognizes in civil rights actions, on a qualified basis—the reasoning holds particularly true for awards of "inherent damages." Because the educator invariably acts under color of state law, must he research for each and every discretionary act, to find whether he should somehow know that his decision might require him to pay monetary damages to some person thereby affected, even though no legal injury had been suffered, if a court should later hold that the decision violated that person's civil rights?

Thus, the very punishment which respondents wish to be imposed upon defendants, absent any real or genuine injury to the plaintiff, has already been addressed, and found undesirable. While it may be said that being compelled to pay damages to a wronged plaintiff will act as a deterrent, nonetheless, the purpose and entire existence of those damages is compensation.[16]

16. *Dellums* v. *Powell* (D. C. Cir. Case No. 75-1974, Aug. 4, 1977), p. 9 of Specially concurring opinion of Circuit Judge Leventhal:

(Footnote continued on next page.)

As Mr. Justice Powell pointed out in *Bangor Punta Operations, Inc.* v. *Bangor and Aroostock R. Co.*, 417 U. S. 703, 717 (1974):

> The Court of Appeals further stated that it was important to insure that petitioners would not be immune from liability for their wrongful conduct and noted that BAR's recovery would provide a needed deterrent to mismanagement of railroads. Our difficulty with this argument is that it proves too much. If deterrence was the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning. Suffice to say that we have been referred to no authority which would support so novel a result, and we decline to adopt it.[14]

14. As Dean Pound stated in reply to a similar argument in *Home Fire:*

> If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. . . . 67 Neb., at 673, 93 N. W., at 1035. (Portions of footnote omitted.)

Punitive damages, and only punitive damages, are the means by which a defendant's wilful misconduct is to be punished, to deter him and others from like conduct.

Two district court judges, sitting as the trier of fact found that neither plaintiff in the present case had quantified their damages or submitted evidence by which the trier of fact could

(Footnote continued from preceding page.)

> . . . Every action for damages has some potential for deterrence, but in the absence of special circumstances calling for exemplary damages, the amount of the award should be based on compensation, not punishment or deterrence.

even speculatively infere the extent of the injuries, and therefore plaintiffs' claims for damages were denied. The 7th Circuit Court of Appeals clearly erred in substituting its judgment for the trier of the fact.

CONCLUSION.

For the reasons set forth above, petitioners Carey, et al. respectfully request this Court to reverse the decision of the Seventh Circuit Court of Appeals and affirm the finding of the District Court.

Respectfully submitted,

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